

Office of the Presiding Officer
Military Commission

September 15, 2004

MEMORANDUM FOR APPOINTING AUTHORITY, MILITARY COMMISSIONS

Subject: Presiding Officer Recommendations on Challenges -- United States v. Hicks

1. Pursuant to your request of 15 September 2004, I have listed below my recommendations concerning the challenges in the case of United States v. Hicks.
2. I note that the standard to be used in challenges is under some dispute. Based on my review of the applicable material, I believe that a person should be relieved from duty as a member if there is good cause to believe that the person could not provide a full and fair trial, impartially and expeditiously, of the cases brought before the Commission. I do not believe that there is an "implied bias" standard in the relevant documents establishing the Commissions.
3. In my opinion, there is no cause to grant a challenge against COL XXXX. His voir dire did not reveal any information which might cause a reasonable person to believe that he could not provide a full and fair trial, impartially and expeditiously. His method of speaking, his deliberation when responding, his ability to understand not only the question but the subtext of the question - all of these show that he is a bright attentive officer who will be able to provide the unbiased perspective which is required by the President for this trial. Even if one were to accept an "implied bias" standard, there was nothing in the voir dire to cause a reasonable person to believe that he is in any way biased in these cases. Based on my personal observations of COL XXXX while he was discussing the death of one of his Marines, he was not unduly affected by the individual death - he regretted the death, but he has had a long career during which he has had occasion to see many Marines die.
4. In my opinion, there is no cause to grant a challenge against COL XXXX. His voir dire did not reveal any information which might cause a reasonable person to believe that he could not provide a full and fair trial, impartially and expeditiously. COL XXXX was asked many questions during open and closed session and he responded carefully and succinctly to all of them. When he knew an answer, he provided it - if he didn't know an answer, he stated the reason therefore. He has a sharp mind and the ability to understand and evaluate difficult situations. COL XXXX is exactly the sort of person who can provide the unbiased perspective which is required by the President for this trial. Even if one were to accept an "implied bias" standard, there was nothing in the voir dire to cause a reasonable person to believe that he is in any way biased in these cases. His "knowledge" of the matters involved in this case was that of a busy Joint Operations Center officer whose primary concern was with providing airlift and getting country clearances for that airlift. He had no knowledge concerning the offenses with which Mr.

Hicks has been charged, and his only involvement in the background of this case was insuring that there was transportation for all detainees. He also has no knowledge of or any specific information about why any specific detainee was being transported, or what actions or offenses any detainee may have been engaged in.

5. In my opinion, there is no cause to grant a challenge against COL XXXX. His voir dire did not reveal any information which might cause a reasonable person to believe that he could not provide a full and fair trial, impartially and expeditiously. Even if one were to accept an "implied bias" standard, there was nothing in the voir dire to cause a reasonable person to believe that he is in any way biased in these cases.

6. In my opinion, there is cause to grant a challenge against LTC XXXX. While his voir dire revealed that he could provide a full and fair trial, his activities within the same area of operations in which Mr. Hicks was captured make his participation problematic in regards to his knowledge of activities in the theater of operations - thereby possibly impacting on his impartiality. He, in fact, was a person who could legitimately be viewed as a possible victim in this case. Removing LTC XXXX would insure that a person who was, in many ways, intimately familiar with the battlefield and the modus operandi of both sides would not have an undue influence upon the deliberations of the panel. While I believe that LTC XXXX would provide a full and fair trial, I recommend that he be removed from the trial.

7. In my opinion, there is some cause to grant a challenge against LTC XXXX. His comments during voir dire and on his member question sheet could be seen as providing a reasonable person cause to doubt his ability to provide an impartial trial. Specifically, his comments that the detainees in Cuba were terrorists, or words to that effect, might cause some to believe that he has prejudged the cases. While I believe that LTC XXXX would provide a full and fair trial, in an abundance of caution, I recommend that he be removed from the trial.

8. As I stated previously, I do not believe that it is appropriate for me to provide a recommendation on any challenge made against me. However, in paragraph 3 of the Prosecution Response to the Defense Brief on Standard for Good Cause Challenge of Commission Members, the Prosecution requested that you closely evaluate the facts elicited during voir dire to determine my suitability to serve using the standard which the Prosecution proposed. I had already done that, and it may be helpful to you for me to provide the evaluation that I used. To the best of my knowledge, there was not any item brought forth in voir dire which might cause a reasonable person to believe that I could not provide a full or fair trial or to show that my impartiality might reasonably be questioned. As I understand the matters involved, it is submitted that I know the Appointing Authority, and that I therefore will do whatever the Appointing Authority wants. As I stated on the record in US v. Hicks, and as I wrote in my Questionnaire, I have not discussed these cases with the Appointing Authority. Based on my knowledge of the Appointing Authority, I believe that he wants me to provide a full and fair trial. Neither of these matters was challenged by the defense or the prosecution during voir dire. The second aspect of the assertion was resolved in this case by my answers to CDC

during voir dire (ROT 12) about my relationship with the Appointing Authority when he was the Staff Judge Advocate at XVIII Airborne Corps. Both sides learned, and neither side followed up to challenge the matter, that the Appointing Authority and I disagreed many times when he was the XVIII SJA, but I always did what I thought was right, and the Appointing Authority always did what he thought was right.

Peter E. Brownback III
COL, JA
Presiding Officer